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### Review of Handbook of Appellate Advocacy, by M. Josephson.

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HANDBOOK OF APPELLATE ADVOCACY. Michael S. Josephson, Kenneth A. Kleinberg, and Franklin Tom. Los Angeles: UCLA School of Law. 1967. Pp. 109. \$2.50.

The practice of appellate advocacy may well be the most abused skill in the legal profession. The successful conduct of an appeal can preserve a client's favorable verdict or reverse his losses; and an appellate determination is often dispositive of the case. Yet, while most members of the bar recognize that trial litigation requires specialized training, too many attorneys regard appellate advocacy as commonplace and devote little or no effort to the study of the techniques of brief writing and oral argument. I have personally observed a sizeable number of cases which were lost on appeal, not because counsel failed to comprehend the issues or because of inadequate preparation, but as a result of counsel's unstructured forensic techniques.<sup>1</sup>

Fortunately, there are writings available which deal with the practice of appellate advocacy, one of the best of which is Frederick Wiener's comprehensive work.<sup>2</sup> However, the very thoroughness of Wiener's book renders it ill-suited for certain purposes. A law student, about to commence his participation in a moot court program, may not wish to devote the time required to study such an extensive work; and if he were to do so, the sheer bulk of Wiener's material might well overwhelm him. The neophyte advocate also needs guideposts to direct the construction of his arguments, but he will be better served by a quantitatively manageable exposition than by an exhaustive treatise.

Thus, notwithstanding the present availability of materials, there is a discernible need for a terse treatment of the basic elements of appellate advocacy, and the handbook under review is a splendid response to that need. Without sacrificing quality, the authors' treatment of the subject is eminently readable and can be digested in a single sitting.

The *Handbook* is divided into four parts: the first deals with the writing of briefs, the second with oral argument, the third contains a description of the moot court program conducted at UCLA, and the fourth (the appendix) contains a model appellate brief. The bulk of the book is devoted to Parts I and II, brief-writing and oral argument, which together with the model brief constitute the book's primary contribution. Part III, which describes the UCLA program,

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<sup>1</sup> The writer's experience is not unique. See F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 6-7 (1961).

<sup>2</sup> F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS (1961). For a collection of a variety of briefs as exemplars of brief writing techniques see J. APPELMAN, APPROVED APPELLATE BRIEFS (1958).

may well be of interest to those who administer a moot court program in which they contemplate making revisions, but it is out of phase with the rest of the handbook and constitutes a detour from the *raison d'être* of the work. In the writer's view, Part III might better have been omitted; but since it comprises only a few pages, it does not constitute a major fault.

### *Brief Writing*

The authors subdivide an appellate brief into several parts and consider each part separately. Each part is first discussed in general terms and then is illustrated by an extract from some Supreme Court or state court brief, which the authors subject to critical analysis. By using extracts, the authors focus the discussion on the specific matter under consideration, which as a pedagogical technique is preferable to setting forth an entire brief or briefs and demanding that the reader himself discern what parts are relevant to the textual discussion.<sup>3</sup> The only value in reproducing an entire brief from its title page to its conclusion is to provide an overview of the interrelation of the several segments of a brief and an exemplar of the proper format. The model brief set forth in the appendix to the *Handbook* is more than adequate for those purposes.

The illustrative extracts are examined by the authors, praised where appropriate, and criticized for errors pinpointed in the text. For example, the organization and argument headings employed in both petitioner's and respondent's briefs in *Engel v. Vitale*<sup>4</sup> were severely (and justly) criticized. The authors then reorganized the arguments and proffered their draft of argument headings that might better have been employed by the parties. This procedure makes an excellent vehicle for instructive purposes: the text first provides a general discussion of argument structure, a bad example is quoted and criticized, and finally the reader is offered a draft of the same argument properly structured. The fact that the bad examples were taken from briefs filed in a landmark Supreme Court case should quicken the reader's interest and emphasize the need for study of appellate advocacy.

The authors do not limit their selection to extracts from appellate briefs. The examples used in the discussion of the State-

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<sup>3</sup> See, e.g., J. APPLEMAN, *supra* note 2, where the author reproduces briefs from virtually every state and leaves the reader to his own devices for determining the instructive value of those briefs.

<sup>4</sup> 370 U.S. 421 (1962). This case dealt with the constitutional validity of a prayer propounded by the New York State Board of Regents for recitation in the New York public schools.

ment of Facts are taken from the majority and dissenting opinions promulgated in the Supreme Court's decision in *National Equipment Rental Ltd. v. Szukhent*.<sup>5</sup> Those opinions are convincing evidence of the validity of the authors' view that the recitation of facts can and should constitute an important device for advocacy of counsel's cause. Moreover, the use of court opinions for that purpose subtly suggests that advocacy is a basic element of an attorney's professional life whether it be in litigation, in negotiation, in preparing an opinion letter for a client, or in delivering the opinion of an appellate court.

Probably one of the most frequently encountered sins in appellate advocacy is for an attorney to ignore the facts of his case and to argue abstract propositions of law. The authors properly emphasize the gravity of this error and urge the reader to interweave the facts of his case into his arguments and argument headings. Additionally, the writers note that where substantial reliance is placed on the precedential value of a prior decision, the operative facts of the prior decision should be stated in the brief. A quotation from a case or a citation thereto, unadorned by a recitation of the case's factual circumstances, has significantly less impact than it otherwise would have. Under the orthodox view of *stare decisis*, the "rule" of a case is found in the holding of the court on the facts before it, rather than in the language employed by the court,<sup>6</sup> albeit the court's language may express reasoning and sentiments which are persuasive and therefore should not be ignored by an advocate. Moreover, the court's language indicates which facts the court regarded as relevant.<sup>7</sup> The distinction between holding and dictum is not easily made and has been the subject of numerous jurisprudential writings. An extensive discussion of that distinction would be inappropriate in a handbook designed as a syllabus for appellate advocacy, and the authors wisely restrained their treatment of this subject.

### *Oral Argument*

The manner of conducting an oral argument should be tailored to suit the personality and individual characteristics of the advocate and to comply with the demands of the particular matter in litigation. One of the pitfalls an author faces in advising others on this

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<sup>5</sup> 375 U.S. 311 (1964).

<sup>6</sup> Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928). But see K. LLEWELLYN, *THE BRAMBLE BUSH* 45-49, 66-69 (1951) for discussion of a more liberal view of the method for determining precedent.

<sup>7</sup> The relevance of this factor is discussed in Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

matter is the temptation to characterize the author's favorite appellate techniques as immutable dogma to be followed slavishly without regard to such individual differences. The authors of the *Handbook* have resisted that temptation for the most part, but they were not entirely successful in doing so. While I am in agreement with most of their suggestions, there are a few with which I take issue and a few with which I concur but do not regard as universal truths.

The authors state that notes and other materials should be used sparingly and that a prepared text or excessive notes will impede face-to-face communication with the court. While I agree with this observation, there are many excellent advocates who keep before them, while delivering their argument, a complete text; and some even go so far as to include in the text anticipated questions and answers. The authors are quite correct in stressing the desirability of visual contact with the court, not only because that permits greater non-verbal communication, but also because it is only through such visual contact that the advocate can achieve a rapport with the court that sensitizes him to the attitude of the judges towards his arguments. This feedback should guide him in the manner and emphasis of his presentation. Nevertheless, some advocates may wish to have a complete text before them, even though they do not read from it, because it serves as a psychological "prop," the value of which should not be underestimated. I suspect that everyone has his own "props." While my personal experience reveals a complete text to be more of a nuisance than a crutch, those who find it helpful should not hesitate to use it.

The authors remonstrate against an advocate's evading an issue that is essential to his case merely because his position on that issue is weaker than his position on other questions in the case. But the text further states: "On the other hand, counsel should avoid subjecting his weaker arguments to the cross examination of the bench if possible." To the contrary, a major purpose of oral argument is to provide counsel with an opportunity to learn what issues trouble the court and to satisfy the court's doubts. Where an argument which is essential to counsel's case appears weak, it may be all the more important to focus on that issue. There is no assurance that the issue will be slighted by counsel's opponent or by the court in its deliberations merely because the weak issue is lightly treated by counsel in his argument. In some instances, it may be good tactics to "soft pedal" a weak issue, but surely it is not always desirable to do so.

Finally, the authors assert that appellee's counsel should use his last few minutes of argument to summarize his case, and that ap-

pellant's counsel should do the same at the conclusion of his opening argument or rebuttal. I do not believe that summations are effective techniques. Counsel may better serve his cause by saving his last few minutes of argument or rebuttal to make a particularly strong point so as to close on a "high note" and, hopefully, thereby color the court's impression of his overall position.

While this review has been critical of several statements in the *Handbook*, the criticism is aimed primarily at the authors' inflexibility on a few issues. These involve relatively minor faults and detract only a little from the commendable worth of the *Handbook*. The *Handbook* contains helpful advice and many valuable insights for the incipient advocate, and it fulfills a need that has otherwise been unsatisfied. I only wish that this book had been available at the time I handled my first appellate case.

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